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No. 94-1509

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH W. SMOLLEN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal common law, rather than state law, governs the determination whether a federal employee was acting "within the scope of his office or employment" for purposes of certification under the Westfall Act, 28 U.S.C. 2679(b) and (d).

2. Whether, under Texas law, petitioner was acting within the scope of his federal employment at the time of his automobile accident.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

American General Ins. Co. v. *Coleman*, 303 S.W.2d 370 (Tex. 1957)	8
Arbour v. *Jenkins*, 903 F.2d 416 (6th Cir. 1990)	6
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	5
Chevron, U.S.A., Inc. v. *Lee*, 847 S.W.2d 354 (Tex. Ct. App. 1993)	8
Cronin v. *Hertz Corp.*, 818 F.2d 1064 (2d Cir. 1987)	6
Forrest City Mach. Works, Inc. v. *United States*, 953 F.2d 1086 (8th Cir. 1992)	6
Garcia v. *United States*, 799 F. Supp. 674 (W.D. Tex. 1992), aff'd, 22 F.3d 609, reh'g en banc granted, 22 F.3d 612 (5th Cir. 1994)	6
Haring v. *Prosise*, 462 U.S. 306 (1983)	7
J & C Drilling Co. v. *Salaiz*, 866 S.W.2d 632 (Tex. Ct. App. 1993)	7-8
Jamison v. *Wiley*, 14 F.3d 222 (4th Cir. 1994)	6
Leadon v. *Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567 (Tex. 1972)	4
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	6
Nasuti v. *Scannell*, 906 F.3d 802 (1st Cir. 1990)	6
Patrick v. *Burget*, 486 U.S. 94 (1988)	5
Platis v. *United States*, 409 F.2d 1009 (10th Cir. 1969)	7

Cases—Continued: Page

S.J. & W. Ranch, Inc. v. *Lehtinen*, 913 F.2d 1538 (1990), amended, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991) 6
Schrob v. *Catterson*, 967 F.2d 929 (3d Cir. 1992) 6
Singleton v. *Wulff*, 428 U.S. 106 (1976) 5
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 6
United States v. *Smith*, 499 U.S. 160 (1991) 2
Westfall v. *Erwin*, 484 U.S. 292 (1988) 2
Wilson v. *Garcia*, 471 U.S. 261 (1985) 5-6
Youakim v. *Miller*, 425 U.S. 231 (1976) 5

Statutes and regulations:

Federal Drivers Act, 28 U.S.C. 2679(b) 6
Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4564-4565 2
Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 7
28 U.S.C. 1402(b) 2
28 U.S.C. 2401(b) 2
28 U.S.C. 2671-2680 (1988 & Supp. V 1993) 2
28 U.S.C. 2679(d) 2
28 U.S.C. 2679(d)(1) 2
28 U.S.C. 2679(d)(2) 2
28 U.S.C. 2679(d)(3) 3
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 6
42 U.S.C. 1983 6
28 C.F.R. 15.3 2
App. 2

Miscellaneous:

H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 46 F.3d 65 (Table). The opinion of the district court (Pet. App. 16a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on January 11, 1995. The petition for a writ of certiorari was filed on March 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4564-4565, which amended the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. V 1993), was passed in response to *Westfall* v. *Erwin*, 484 U.S. 292 (1988), in which the Court declined to recognize a rule of absolute immunity for torts committed by federal employees within the scope of their employment. *United States* v. *Smith*, 499 U.S. 160, 163 (1991). The Westfall Act changes the result in *Westfall* v. *Erwin* by providing that suit against the United States under the FTCA is the exclusive remedy for certain wrongful or negligent acts of federal employees committed within the "scope of * * * office or employment." *Smith*, 499 U.S. at 163 & n.3. The Act may be invoked through a certification by the Attorney General (or her designee) that the employee was acting within the scope of his or her employment. 28 U.S.C. 2679(d).[1] If such a certification is made, the suit is "deemed to be an action or proceeding brought against the United States" under the FTCA, and "the United States [is] substituted as the party defendant." 28 U.S.C. 2679(d)(1) and (2). If the Attorney General declines to issue a certification, the employee may "at any time before trial petition the court to find and certify that

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[1] The Attorney General has delegated certification authority to the Assistant Attorney General in charge of the Civil Division and to the United States Attorneys. See 28 C.F.R. 15.3 and Appendix. For simplicity, however, we refer to certification "by the Attorney General."

the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3).

2. Petitioner, an employee of the Strategic Petroleum Reserve Management Office of the Department of Energy (DOE) in New Orleans, Louisiana, was authorized to travel to Houston, Texas, on official business. Upon his arrival in Houston, petitioner rented a car, as authorized by his travel papers, and drove to Southern Petroleum Labs to review and oversee certain crude oil lab tests in an effort to devise a better way to measure the amount of gas in oil under high pressure. Several hours later, petitioner drove to his hotel. From there, petitioner called his brother-in-law, who invited petitioner to his home for dinner. Petitioner drove approximately 25 miles to his brother-in-law's house, arriving at about 7:30 p.m. While there, petitioner ate dinner, watched television, had two drinks, and discussed the gas-in-oil project, family matters, and recipes. On the way back to his hotel, in the early morning hours, petitioner was involved in an automobile accident with a pedestrian. Pet. App. 2a-3a, 17a. Petitioner removed the ensuing state wrongful death action to the United States District Court for the Southern District of Texas.

3. After the Attorney General refused to certify that petitioner was acting within the scope of his employment at the time of the accident, petitioner filed a complaint for declaratory relief in the district court, seeking certification by the court under 28 U.S.C. 2679(d)(3).[2] The district court declined to

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[2] Section 2679(d)(3) provides that the federal employee may request a judicial certification through a petition filed in the court that has jurisdiction over the underlying action. Although

provide certification, concluding that petitioner was acting outside the scope of employment. Pet. App. 2a, 3a-4a.

Applying Texas law, the court held that petitioner could prevail only by proving that, at the time of the accident, he was acting (1) pursuant to the general authority given him, (2) in furtherance of his employer's business, and (3) to accomplish the object for which he was employed. Pet. App. 21a, citing *Leadon* v. *Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972). The court found that during petitioner's visit to his brother-in-law's home the two men discussed petitioner's gas-in-oil project, and that petitioner took notes of their conversation. Pet. App. 18a. It also found, however, that the discussion took place without the knowledge or authorization of petitioner's supervisor, and that petitioner's brother-in-law "ha[d] no knowledge, training, or experience that could be of assistance to DOE on the gas-in-oil project," did not understand the substance of petitioner's technological issues, and suggested only that, for purposes of his presentation, petitioner "put down [his] problem and say why it is a problem." *Id.* at 19a-20a. Taking into consideration the dinner, drinks, television, and conversations regarding recipes and family matters, the court concluded that "[petitioner's] get-together with his brother-in-law was for his own, personal purposes, and not to further the purposes of carrying out DOE's business." *Id.* at 20a.

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petitioner in this case did not follow that procedure, the propriety of his independent action for declaratory relief was not disputed in or decided by the courts below.

4. The court of appeals affirmed, in a per curiam opinion. Pet. App. 1a-13a. The court declined to address petitioner's argument that the district court erred in applying state law, rather than federal common law, to the scope-of-employment determination, since petitioner did not raise that argument before the district court, and no showing of manifest injustice warranted consideration of the argument for the first time on appeal. *Id.* at 4a-6a. Turning to those arguments that petitioner had preserved, the court rejected both petitioner's claim that the district court's fact-findings were clearly erroneous, and his contention that the district court misapplied Texas law. *Id.* at 6a-11a.

ARGUMENT

1. Petitioner argues (Pet. 10-17) that federal common law, rather than state law, applies to scope-of-employment determinations made under the Westfall Act. Because, as petitioner concedes (Pet. 21-22), he failed to raise that issue before the district court, the court of appeals correctly declined to address it, *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976), and the claim is not properly presented to this Court for resolution in the first instance, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). Although the Court will, in exceptional cases, review questions not pressed or passed upon below, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976), this is not an exceptional case.[3]

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[3] Contrary to petitioner's view, Pet. 21-22, the fact that federal courts applying different States' standards may reach different conclusions on similar facts does not constitute a "manifest injustice." Courts applying federal statutes frequently borrow rules of decision from state law. *E.g.*, *Wilson*

The courts of appeals that have ruled on the issue have, in all events, uniformly held that the scope-of-employment determination under the Westfall Act is to be made under the law of the State in which the alleged incident occurred. See *Nasuti* v. *Scannell*, 906 F.2d 802, 805 n.3 (1st Cir. 1990); *Schrob* v. *Catterson*, 967 F.2d 929, 934 (3d Cir. 1992); *Jamison* v. *Wiley*, 14 F.3d 222, 237 (4th Cir. 1994); *Arbour* v. *Jenkins*, 903 F.2d 416, 421-422 (6th Cir. 1990); *Forrest City Mach. Works, Inc.* v. *United States*, 953 F.2d 1086, 1088 n.5 (8th Cir. 1992); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1542 (1990), amended, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991); cf. *Cronin* v. *Hertz Corp.*, 818 F.2d 1064, 1065 (2d Cir. 1987) (scope of employment under Federal Drivers Act governed by state law).[4] Application of state law

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v. *Garcia*, 471 U.S. 261, 279 (1985) (borrowing state limitations periods to govern timeliness of actions under 42 U.S.C. 1983); *Maryland* v. *Louisiana*, 451 U.S. 725, 751-752 (1981) (borrowing state law rules under Outer Continental Shelf Lands Act); cf. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (borrowing state law to determine, under federal common law, the relative priority of liens arising from government lending programs).

[4] The contrary holding in *Garcia* v. *United States*, 799 F. Supp. 674 (W.D. Tex. 1992), aff'd, 22 F.3d 609, reh'g en banc granted, 22 F.3d 612 (5th Cir. 1994), provides no basis for certiorari. The district court's determination in *Garcia* that, under federal common law, the employee was acting within the scope of his federal employment was affirmed by the court of appeals solely on the basis of the panel's holding that the Attorney General's certification was not subject to judicial review. 22 F.3d at 611. The court of appeals has since accepted a petition for en banc review, and its disposition of the case will likely be controlled by this Court's decision respecting the reviewability of certifications made by the

to the scope-of-employment determination under the Westfall Act is fully consistent with the application, under the FTCA, of the substantive law of the place "where the act or omission occurred." See 28 U.S.C. 1346(b).[5]

2. Petitioner argues in the alternative (Pet. 18) that, "even assuming that state law is the applicable law, the court of appeals' decision is * * * contrary to settled Texas jurisprudence." The question whether lower federal courts have erred in their application of state law is not ordinarily a matter that warrants this Court's review. *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). Moreover, the lower courts did not err in their application of Texas law to the facts of this case.

In Texas, "the general rule [is] that use of public streets or highways in going to or returning from one's place of employment is not within the scope of one's employment." *J & C Drilling Co.* v. *Salaiz*, 866

Attorney General in *Gutierrez De Martinez* v. *Lamagno*, No. 94-167 (argued Mar. 22, 1995). Although the district court's holding in *Garcia* regarding the application of federal common law conflicts with the unreported decision of the district court in this case, the conflict between two district courts in the same circuit is appropriately left for resolution by the court of appeals for that circuit.

[5] The legislative history of the Westfall Act demonstrates Congress's intent that scope-of-employment determinations under the Act be subject to the same principles that determine whether the United States is liable for employee acts under the FTCA—*i.e.*, the *respondeat superior* principles of the State where the acts occurred. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 5-6 (1988). Federal law and policy may play important roles insofar as they define the nature of the responsibilities of the federal officer or employee. See, *e.g.*, *Platis* v. *United States*, 409 F.2d 1009, 1011 (10th Cir. 1969).

S.W.2d 632, 636 (Tex. Ct. App. 1993), citing *American General Ins. Co.* v. *Coleman*, 303 S.W.2d 370, 374 (Tex. 1957); see also *Chevron, U.S.A., Inc.* v. *Lee*, 847 S.W.2d 354, 355 (Tex. Ct. App. 1993). Although Texas law recognizes an exception to that principle when an accident occurs while the employee is serving on a special mission or assignment for his employer, to qualify for the special mission exception the employee must be both subject to his employer's control and acting in furtherance of his employer's business at the time of the accident. See *Chevron, U.S.A., Inc.* v. *Lee*, 847 S.W.2d at 356.

Here, the district court found that "[t]he preponderance of the evidence support[ed] the conclusion that [petitioner's visit to his brother-in-law's home] was for his own, personal purposes, and not to further the purpose of carrying out DOE's business." Pet. App. 20a. Particularly in light of the events that transpired during that visit (*i.e.*, dinner, drinks, television, and conversation regarding family matters and recipes), the district court's finding that the visit served petitioner's "personal purposes" cannot be set aside as clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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